

No. 21,775

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONOLITH PORTLAND MIDWEST
COMPANY, a Nevada Corporation

Appellant,

v.

KAISER ALUMINUM & CHEMICAL
CORPORATION, KAISER ALUMINUM
& CHEMICAL SALES, INC., GEORGE
C. DAVIS AND PALMER FORD,

Appellees.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

We find that Appellees Brief is notable in its lack of any attempt to meet or refute in specific terms many of the points of controlling importance raised in our opening brief. Rather, Appellees have, for the most part, contented themselves with sweeping generalizations and have included copious references to their *briefs* filed in the proceedings below, but precious few to the record itself. While those briefs make reference to the record, it would appear that Appellees consider it essential to present their position to this Court in the filtered light of the commentary in those briefs rather than in the clear and uncompromising light of the record itself.

In the same vein, Appellees' Brief appears to be more an effort to convince this Court that Findings of Fact, as such, are impregnable rather than to point out evidence which will support them. Indeed, we submit that Appellees do protest overmuch at page 150 of the appendix to their brief when they contend that the admittedly "few instances" when their "annotated" Findings refer "directly to the evidence" should not be taken as an admission that the Findings lack supporting evidence. The fact is that Appellees have chosen to hide behind the Findings of Fact and Memorandum of Decision rather than to meet Appellant's challenge on the only appropriate field of combat, the record itself.

Appellees' Brief does, however, require some comment for the purpose of correcting inaccuracies and to point out unwarranted speculation.

RULE 52(b)

Throughout their brief, Appellees place great emphasis on the fact that Appellant did not object to the Findings of Fact adopted by the trial court (see Appellees' Brief pp. 9, 27, 71). Rule 52(b) of the Federal Rules of Civil Procedure states that when findings of fact are made,

"... the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

True, as Appellees state (Brief p. 26) Local Rule 7 of the district court does provide for the preparation of findings of fact, but requires that "the findings of fact shall be set out in *concise* narrative form. . . ." (emphasis added). Thus, in view of our right not to object,

Monaghan v. Hill, (9 Cir. 1944) 140 F.2d 31 and *Bingham Pump Co. v. Edwards*, (9 Cir. 1941) 118 F.2d 338; and in view of the lack of conciseness in the findings of fact, such objections would have been considered by the trial court, we believe, to be an attempt to retry the case. Accordingly, we have no doubt that any objections by Appellant to them would have resulted only in a further charge by Appellees of undue prolongation.

We also believe it appropriate to point out that Appellant's notice (R.4640) that it would not file objections to the proposed findings specifically preserved Appellant's rights under Rule 52(b), and that the implication at page 71 of Appellees' Brief that the court ordered Appellant to oppose these findings is misleading. The Court order (R.3793) simply extended the time within which objections *could* be filed and in no way required Appellant to file such objections.

ALLEGED CONCEALMENT OF STATUTORY BARS Sale Of Part Of An Invention Cannot Be A Statutory Bar

Because it is crucial to an informed review of the proceedings below, we repeat here that the trial court committed reversible error when it held that the sale of *brick* in 1955 to Riverside and Southwestern was a statutory bar, because the invention claimed in the patent in suit was not *brick*, but rather a *lined kiln*. In this regard, we refer the Court to our discussion of this point at pages 51 through 54 and 63 and 64 in our opening brief. We acknowledge with apology our misquotation of the decision in *Hemphill Co. v. Jordan*, (M.D. N.C. 1949) 86 F.Supp. 248, 250-251, which is pointed out at page 38 of Appellees' Brief. However, we do take serious exception to Appellees' attempt to dispose of the importance of the decision in *Hemphill* on the basis of that immaterial accident. It is fundamental that a sale takes place when goods

are appropriated to the contract or when the contract is made and physical delivery is not necessary to the transfer of title. *Winborne v. McMahan* (Supreme Ct. N.C. 1934), 206 N.C. 30, 173 S.E. 278. Since the goods in *Hemphill* were shipped on January 30, 1932, they must have been appropriated to the contract at least as early as that date which was prior to the statutory bar date of February 3, 1932. Thus, *Hemphill* stands for precisely the proposition for which we relied upon it in our opening brief, viz., sale prior to the statutory bar date of unassembled parts which parts may at some subsequent time be assembled to comprise the patented invention is not a statutory bar because that which has been sold is not the invention itself. Thus, Appellees' attempt to capitalize on our inadvertently incomplete quotation is of no avail.

Appellees' attacks on our contentions in this regard, both of which may be aptly characterized as sloganeering, are as follows:

1. Experimental use is a question of law (page 36 of Appellees' Brief) — a bald effort to limit this Court's review to conclusionary Finding of Fact No. 99 and prevent it from evaluating the underlying facts which are *undisputed*.

2. Since the trial court found Kaiser's sale of short-shimmed brick to be contributory infringement, the maxim "that which infringes if later, anticipates if earlier" brings about a metamorphosis of the 1955 sales of brick into statutory bars (page 37 of Appellees' Brief) — a play on words which sacrifices substance on the altar of form.

As to the first, it suffices to refer to pages 57 and 58 of our opening brief and to repeat that Findings 55-58, 62 and 98 which are incorporated by reference in Find-

ing 99 fall far short of stating the requisite facts for a statutory bar. At best, these findings are directed to sales of *brick* and use of such *brick* by *installation* in a kiln, *not* to sale or use of the patented invention, a lined kiln.

As to the second, we need only point out that contributory infringement, by definition, involves *less* than all of the invention. Thus, the trial court's finding that sale of brick amounts only to contributory infringement and not to direct infringement is telling confirmation of our position that sale of such brick could not constitute a statutory bar. If, as Appellees apparently insist, the matter is to be expressed as law by cliché, let it be correctly expressed as "*only* that which *directly* infringes if later, anticipates if earlier." We trust that this Court will find the rational precedent discussed on pages 52-54 of our opening brief far more compelling than Appellees' play on words.

New Matter

Appellees continue to argue that the claims in suit below depended upon new matter, noting Findings of Fact 80 through 87 and commenting that we have not challenged these Findings (Appellees' Brief p. 32). Appellees here simply complain about form without regard to substance inasmuch as we extensively considered and refuted their contention of new matter (Appellant's Brief pp. 66-71) in our treatment of Finding of Fact 102.

The Halstead Affidavit

The last paragraph on page 33 of Appellees' Brief could hardly be more inaccurate in describing Patent Office practice. Patent Office Rule 196(b) in effect at the time the Halstead affidavit was filed during prosecution

of the patent application which issued as the patent in suit provided:

“Should the Board of Appeals have knowledge of any grounds not involved in the appeal for rejecting any appealed claim, it may include in its decision a statement to that effect with its reasons for so holding, which statement shall constitute a rejection of the claims. . . .”

Thus, unlike conventional appellate practice, the administrative appellate practice of the Patent Office expressly provides for institution of new grounds of rejection for the first time by the Patent Office Board of Appeals. Thus, there would have been no procedural inhibition whatsoever on the Patent Office Board of Appeals had it considered the Halstead affidavit to disclose a ground for rejecting the claims before it. Consequently, if, as it must in the absence of any showing to the contrary, full faith and credit is given to the statement by the Board of Appeals that it considered “all of the affidavits and other evidence submitted by appellant” (Ex. 2/V, page 347), the only possible conclusion is that the Board of Appeals gave full consideration to this question and decided it in Appellant’s favor. Having so decided the point in Appellant’s favor, there was no need for the Board of Appeals to mention this in its decision since Rule 196(b) requires only that new grounds of rejection be expressly stated, not that grounds of rejection which are considered and discarded be mentioned.

Appellees’ attempt to make much of the assertion that there was “delay” in filing the Halstead affidavit (Appellees’ Brief, page 34). However, this line of argument establishes, at best, only that Appellant’s employee Rentsch might have been able to execute an affidavit to the same effect at a date earlier than that on which the

Halstead affidavit was filed, *not* that *Halstead*, an employee of a *competitor* of Appellant was available at a date earlier than that on which the affidavit was filed. Thus, Appellees' charge of "perfidy" (Appellees' Brief, Page 34) is supported by no evidence of any kind.

Furthermore, in the context of determining whether Appellant concealed statutory bars from the Patent Office, the significance of the Halstead affidavit is in no way concerned with *when* it was filed, but rests solely on the fact that it *was filed*. If concealment was Appellant's purpose, it is inconceivable that it would make a clear and unequivocal disclosure of that which it is charged with concealing, *United States v. Cold Metal Process Co. et al*, (6 Cir. 1947) 164 F.2d 754.

The 1955 Uses By Riverside And Southwestern Were Experimental

At page 39 of their brief, Appellees contend that the testimony of Mr. Woodward of Southwestern "demolished" the proposition that the 1955 use by that company of Kaiser's short-shimmed brick was experimental as well as the proposition that Appellant could have held a good faith belief that Southwestern's use was experimental. Not so. The Woodward episode is so revealing that we have reproduced it at pages 39-61 of the Appendix to our opening brief. That excerpt tells the whole story with Appellant's counsel attempting to elicit testimony with regard to experimental use (Appellant's Appendix, p. 46). counsel for Appellees insisting that such use could not possibly be experimental because Southwestern purchased the bricks used in the experimental lining (Appellant's Appendix, pp. 44-45), the court's acceptance of Appellees' view (Appellant's Appendix, p. 51) and, finally restriction by the court of Appellant's examination to the question of whether experiments were conducted by

Southwestern *on behalf of Kaiser* (Appellant's Appendix, p. 53). Thus, as pointed out at pages 60-62 of our opening brief, the court committed reversible error when it prevented Appellant from examining Mr. Woodward as to whether the 1955 use by Southwestern was experimental.

Furthermore, as pointed out at pages 59 and 62 of our opening brief, Kaiser's own documents, Ex. 183/FZ and Ex. 186/GA, establish that the 1955 uses by Riverside and Southwestern, respectively, were indeed experimental. Understandably, Appellees failed to comment on either of those exhibits in their brief.

The Petition To Make Special

Appellees' speculation (Brief pp. 48-49) that the Examiner withdrew the Davis patent since he was convinced Appellant could "swear back" of the Davis reference under Rule 131 of the Patent Office because of the affidavit attached to the Petition to Make Special is not supported by the record. First, the relevant comment by Appellant (R.2029-2030) in the prosecution of the Anderson C-I-P application referred to the Anderson parent patent application and offered to supply an affidavit under Rule 131 if necessary, rather than basing the offer on the allegations in the Petition to Make Special as now contended by the Appellees. Clearly, in light of Patent Office practice if the Examiner had thought that the Davis reference could only be removed under the requirements of Rule 131 rather than by reliance on the relation back of the C-I-P to the parent application, he would not speculate but would have required such an affidavit from Appellant. Second, Rule 131 requires a showing of facts sufficient to establish reduction to practice prior to the filing date of the Davis patent, or conception of the invention prior to the filing date coupled with due diligence to a subsequent reduction to practice or filing of an application. The rule

further requires originals or photocopies of drawings or records or an explanation of their absence from the affidavit. Not only did the district court not find that the facts alleged in the Petition to Make Special would have constituted a sufficient showing under Patent Office Rule 131, but also the allegations contained in the Petition would not have been sufficient compliance with Rule 131 so as to take the place of a Rule 131 affidavit. We submit that Appellees have failed to rebut our clear showing (Appellant's Brief pp. 70-71) that on the one occasion when the Patent Office was called upon to make its own determination with regard to the question of "new matter" it decided in favor of Appellant, and have offered only unwarranted speculation.

THE CONFIDENTIAL INFORMATION CAUSE OF ACTION

We agree with the Appellees (Appellees' Brief p. 10) that the invention and trade secret which is the heart of the controversy is "extremely simple". Yet, Appellees' contention that they possessed for years a full knowledge and understanding of the use of short shims contrasts sharply with the undisputed facts which are that appellees (1) received in August 1953, and thereafter, information from Monolith concerning the desirability and usefulness of short shims in cement kiln linings, (2) thereafter commenced to use short shims embodied in their UNITAB kiln liner, promoted the use thereof and sold them to others, and (3) filed the patent application of Davis directed to the UNITAB liner, the *only* new feature of which was the flanged short shim.* The fact that, for a long period of time, Kaiser had used *full* longitudinal shims and moved to *short* shims *only* after the disclosure

*All else had been disclosed in Appellees' prior Wilkins Patent No. 2,915,893 filed March 27, 1953 (Exhibit 17).

of short-shimming to it by Monolith makes Kaiser's contention transparently insubstantial.

This, taken with the district court's finding that there was a confidential relationship between the parties (Finding of Fact No. 68, R.3726), makes it logically impossible to reach the conclusion that Appellees did not misappropriate confidential information disclosed by Appellant (see pages 109 and 119 of Appellant's Opening Brief).

The testimony of Mr. Bert Oberg set forth at pages 80-82 of Appellees' Brief is enlightening only when considered *in context*. Mr. Oberg was there testifying concerning Kaiser's failure to supply instructions pertaining to the use of its refractories, and the preparation of instructions by Monolith explaining a suitable mode of installation of such brick (Tr.2971, line 6 through 2972, line 20). Oberg further explained that the information supplied to Kaiser was *routine*, as distinguished from trade secrets:

"BY MR. ELLIOTT:

Q What type of information did you furnish to Kaiser as you described it to Mr. Rieber generally yesterday? Specifically, what information did you disclose or give to Kaiser in the years that followed?

A It was routine information in regards to the installation of the Kaiser refractories. It included the location of where the brick was placed in the kilns, the number of brick and shims used, the lining lives, the status of refractories' inventory and as we mentioned the instructions." (Tr.3097)

STATUTE OF LIMITATIONS

We are at a loss to understand Appellees' contention (Appellees' Brief pp. 85-86) that we have for the first

time raised the “continuing tort” theory with respect to the Statute of Limitations question. In “Plaintiff’s Response to Pre-Trial Memorandum of Defendants re Order of Proofs” (R.1639-1662), which Appellees state contains nothing about a “continuing tort” (Appellees’ Brief p. 85), this precise issue is raised at R.1655 and is referred to in the footnote at R.1653. The issue of “continuing tort” was also raised at R.1760 in “Pre-Trial Conference Order — REV. I (Cont’d)” (R.1751-1760), and in Exhibit VII to the adopted “Pre-Trial Conference Order” filed November 8, 1963 (SR. 30-149) at SR. 118. Furthermore, there was no finding by the trial court that no continuing tort existed.

With regard to the *Thompson* decisions referred to on page 86 of Appellees’ Brief, we want to point out that Appellees, as did we in our opening brief, have miscited *Thompson v. California Brewing Co.*, 191 Cal.App.2d 506 (1961) as having been decided in 1951. Thus, the discussion of this case in Appellant’s Brief did in fact concern the final decision.

ATTORNEYS FEES

The Piggie Park Case

Appellees have (Appellees’ Brief pp. 94 & 97) attempted to find some comfort in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 19 L.ed.2d 1263 (1968), which they assert to be contrary to the long and unbroken line of authority represented by *Arcambel v. Wiseman*, 3 Dall. 306, 1 L.ed. 613 (1796); *Oelrichs v. Spain*, 82 U.S. 211, 21 L.ed. 43 (1872); *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 13 L.ed.2d 248 (1964) and *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 18 L.ed.2d 475 (1967) which line of authority compels the conclusion that it is settled American policy

not to permit an award of attorney fees in a case such as the present one on the “general equity power” of the courts. However, *Piggie Park* is of no help to Appellees.

Indeed, *Piggie Park* is precisely the same type of case as was *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4 Cir. 1951), which was discussed at pages 28 and 29 of our opening brief. In both *Rolax* and *Piggie Park* the action was one brought by a disadvantaged negro which, if successful, would result in benefit to other non-litigant members of an identifiable group (union members in *Rolax* and restaurant patrons in *Piggie Park*). Thus, both of these cases involve creation of a “common right” and are closely analogous to the common fund situation presented in *Sprague v. Ticonic National Bank*, 307 U.S. 161, 83 L.ed. 1184 (1939) and Appellees here cannot claim to have created either a common right or a common fund.

Indeed, if anything, Appellees’ position finds even less support in *Piggie Park* than it did in *Rolax* for *Piggie Park* involved an award made on the basis of statutory authority, 42 U.S.C. 2000(a)-3(b), and not on the basis of some “general equity power”. *Piggie Park* is also even further removed than *Rolax* because the statute upon which the award was there based does not even require a showing of bad faith or any other type of inequitable conduct. Rather, that statute, also known as Section 204(b) of the Civil Rights Act of 1964, provides that the trial judge may award attorney fees whenever, in his discretion, such an award is appropriate. This is, of course, as it should be because, just as in common fund cases such as *Sprague*, cases brought under civil rights legislation often work to the benefit of significant numbers of non-litigants who in no way contribute to prosecution of the litigation.

The footnote quotation from 6 Moore Federal Practice 1352 (1966 Ed.) in *Piggie Park* to which Appellees' attempt to attach so much significance is pure dicta which is in no way part of the holding in *Piggie Park*. Indeed, Appellees' admission (Appellees Brief, Page 94) that the quotation from Moore follows a discussion of the common fund case of *Sprague v. Ticonic National Bank*, *supra*, is telling in that it reflects the fact of the matter, viz., that no support is given by Moore for the quoted statement which is nothing more than Moore's view of what the law *should be*, not what the law is. We are confident that this Court will not give more weight to Professor Moore's suggestion than to the rulings of the Supreme Court in *Arcambel*, *Oelrichs*, *Farmer* and *Maier*.

The Applicable State Law

Appellees have not challenged Appellant's position (Appellant's Brief, Pages 31-35) that state law is applicable to any non-patent attorney fee award in this case and attempt to sluff off the effect of state law in a single paragraph on page 96 of their brief. Significantly, Appellees do not even mention Section 1021 of the California Code of Civil Procedure which we submit to prohibit any award of attorney fees for non-patent services in the present case. Thus, this point comes to this Court effectively conceded by Appellees.

The Carter Case

At page 93 of their brief, Appellees state with regard to the decision in *Carter Products, Inc. v. Colgate-Palmolive Co.*, 214 F.Supp. 383 (D. Md. 1963) that:

“No allocation was made in *Carter* as between respective services rendered in connection with the

patent phase and the trade secret phase of the case . . .”

If, by this, Appellees are attempting to suggest that there is some support in *Carter* for the holding of the trial court in the present case (R.4665) that attorneys fees for non-patent services may be awarded under the patent statute, 35 USC 285, they misconceive *Carter* entirely. Rather, as pointed out at page 23 of our opening brief, the court in *Carter* said at 214 F.Supp. 414:

“There is no similar statute with respect to the trade secret issues. Any such award must be based on the inherent power of a federal court to award attorneys’ fees as costs in certain types of cases.”

While the court committed error in *Carter* by finding that it did have such inherent power (see pages 29 and 30 of our opening brief), it did not commit, however much Appellees would have it otherwise, the additional error of basing an award of fees for non-patent services on the patent statute.

Awards To Defendants In Patent Cases

Appellees’ predilection for positions based on form rather than substance necessitates comment concerning the footnote of page 90 of Appellees’ Brief regarding *Rayonier v. Georgia Pacific Corp. Georgia-Pacific*, although a defendant in form, was the patent owner in a declaratory judgment action and thus stood in the substantive position of a plaintiff. Thus, the award in *Georgia-Pacific* is in no meaningful way in conflict with our representation to this Court (Appellant’s Brief p. 104) that the largest reported amount awarded to a prevailing substantive defendant in a patent case as attorney fees was \$40,000.00. However, we do want to point out a case reported after Appellant’s Brief was

filed, *Barr Rubber Products Co. v. Sun Rubber Co.*, (S.D. N.Y. 1968) 279 F.Supp. 49, wherein an award of \$60,179.68, was made to a prevailing plaintiff in a declaratory judgment action. Although the award was higher than in *Young v. General Electric Co.* (N.D. Ill. 1961), 96 F.Supp. 109, the court in *Barr* made drastic reductions involving matters on which the losing party prevailed and an additional reduction apparently based primarily on duplication of effort and non-essential services.

CONCLUSION

We believe that Appellees have failed to refute our assignment of the errors made by the trial court below, and have not answered the questions presented by this appeal other than in sweeping generalities. As we have stressed in our opening brief and in this reply brief, we believe that many substantial errors were committed below and we ask this Court to reverse the rulings of the district court on each of the issues presented in this appeal.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By.....
JAMES W. GERIAK